
UTAH LABOR COMMISSION

AVERY NUNLEY,

Petitioner,

vs.

**MOUNTAIN STATES FENCE
and LIBERTY MUTUAL INS. CO.,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 04-1174

Liberty Mutual Insurance Co., one of Mountain States Fence's workers' compensation insurance carriers, asks the Utah Labor Commission to review Administrative Law Judge La Jeunesse's determination that Liberty Mutual is liable for benefits awarded to Avery Nunley under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Nunley claims workers' compensation benefits for a back injury that occurred on September 17, 1998, while working for Mountain States. At the time of the September 1998 accident, Liberty Mutual was Mountain States' insurance carrier. Over the next several years, Mr. Nunley experienced additional episodes of back pain at Mountain States, during periods of time when other insurance companies provided Mountain States' workers' compensation coverage.

Judge La Jeunesse held an evidentiary hearing on Mr. Nunley's claim and then concluded that Mr. Nunley's need for medical care was necessitated by the September 1998 accident. Judge La Jeunesse therefore ordered Liberty Mutual to pay the reasonable expense of that medical care.¹

Liberty Mutual now requests Commission review of Judge La Jeunesse's decision. Specifically, Liberty Mutual argues that the other insurance companies who provided Mountain States' workers' compensation coverage at the time of Mr. Nunley's subsequent episodes of back pain are liable for Mr. Nunley's medical expenses.

FINDINGS OF FACT

¹ Because Mr. Nunley did not incur and submit any medical expenses for a period of more than three years, Judge La Jeunesse concluded that his entitlement to medical benefits lapsed as of April 22, 2002, pursuant to § 34A-2-417(1) of the Workers' Compensation Act. The Commission notes that the 2007 Utah Legislature deleted the three-year "incur and submit" provision from § 34A-2-417(1) for injuries that occur after April 30, 2007.

ORDER AFFIRMING ALJ'S DECISION
EVERY NUNLEY
PAGE 2 OF 4

The Commission adopts Judge La Jeunesse's findings of fact, which are undisputed. The following facts are relevant to the issue of Liberty Mutual's liability for Mr. Nunley's medical expenses.

On September 17, 1998, Mr. Nunley was standing on the bed of a truck when the truck's load shifted, forcing Mr. Nunley to jump from the truck. As a result of this event, Mr. Nunley suffered back injuries diagnosed as lumbar discopathy. He was off work for one month to treat the injury. Thereafter, his back pain flared up from time to time. In April of 1999, he experienced back pain while mixing cement. On September 9, 1999, he suffered back pain as he carried bundles of fencing and posts. In April of 2002, Mr. Nunley again experienced back pain while engaged in heavy lifting.

Dr. Dall examined Mr. Nunley and concluded that his initial work accident in September 1998 "is the primary incident responsible for his persisting symptoms. All others represent exacerbations of that underlying incident." Dr. Passey, who examined Mr. Nunley on behalf of Liberty Mutual, reached a similar conclusion. According to Dr. Passey, the incidents from April 1999 through April 2002 were only *recurrences* of back pain, with the accident on September 17, 1998, "more likely than not that preponderant cause of ongoing impairment."

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-418 of the Utah Workers' Compensation Act requires employers and their insurance carriers to pay reasonable sums for medical care necessary to treat an injured employee. In this case, there is no dispute that Mountain States' insurance carriers must pay for Mr. Nunley's medical treatment. The only question is which of those insurance carriers is liable for those expenses.

Liberty argues that each of Mr. Nunley's episodes of back pain constitute a separate compensable work accident, so as to shift liability for ensuing medical care from Liberty Mutual to the other insurance carriers providing Mountain States' workers' compensation coverage at that time. Liberty cites to the Utah Court of Appeals' decision in Virgin v. Industrial Commission, 803 P.2d 1284 (Utah Ct. App. 1990) and other appellate decision to support this argument. However, in Virgin the Court of Appeals observed that the "temporary aggravation or nonratable acceleration of symptoms" from a preexisting condition did not constitute a compensable work accident. Virgin v. Industrial Commission, 802 P.2d at 1289.

Liberty Mutual's argument in this case has been addressed by the Utah Supreme Court in United States Fid. & Guar. Co. v. Industrial Comm'n, 657 P.2d 764, 766 (Utah 1983). There, the worker suffered two accidents while employed by the same company, but different insurance carriers provided workers' compensation coverage at the time of each accident. The Supreme Court held:

Once a compensable injury occurs, there is no limitation as to the time during which

ORDER AFFIRMING ALJ'S DECISION
AVERY NUNLEY
PAGE 3 OF 4

medical expenses must continue to be furnished. Since the obligation of the employer to pay ongoing medical expenses may continue indefinitely, a subsequent aggravating injury does not relieve the initial employer of the obligation to bear the medical expenses *which remain attributable to the prior injury*. Id. at 766 (emphasis added).

In this case, the medical evidence establishes that Mr. Nunley's medical expenses remain attributable to his original injury of September 1998. Because Liberty Mutual was Mountain States' insurance carrier at that time, Liberty Mutual is liable for payment of Mr. Nunley's medical expenses.

ORDER

The Commission affirms Judge La Jeunesse's decision. It is so ordered.

Dated this 17th day of March, 2008.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

